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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

NANCI FISHER, STEPHEN FISHER,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO,

Respondent.

CITIBANK, N.A. [NEW YORK],
CITIBANK, FSB [CALIFORNIA],
CITIBANK (SOUTH DAKOTA]) N.A.,
MASTERCARD INTERNAITONAL, INC.,
C.L. SMOOT and T. SCHMIDT,

Real Parties In Interest.

On Petition For Writ Of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Concerning national banks' credit card operations — for 100+ million holders of bank-issued credit cards; do State laws exercise control over legal matters indisputably not involved with any facet of the National Bank Act?

When operating in a vacuum that is totally void of conflictive and restrictive statutes — does a court abuse its discretion and shirk its duty by outright refusing to enforce the precise, easy-to-understand statutes that were specifically enacted in order to protect the public?

In the context of massive deception that creates an unquestionable reality in which "Citibank" is not "Citibank" — do 29-million Citbank credit card holders have a right to be honestly advised as to who is the responsible issuer of their credit cards?

This question presents a novel issue that has never been ruled upon by this court.

The Parties

The parties to the proceedings below were petitioners Nanci Fisher and Stephen Fisher who are appearing pro se. The petitioners are not attorneys and have never studied law. Petitioner Nanci Fisher is the chief executive officer of a San Francisco personnel staffing company. Petitioner Stephen Fisher is a writer, his most recent book, *Colon Cancer & The Polyps Connection* is the world's best selling book specifically dealing with this dreadful disease.

The Superior Court of the State of California for the County of San Francisco is the respondent. And, Citibank N.A. [New York]; Citibank FSB [California]; Citibank (South Dakota) N.A.; Mastercard International, Inc.; C.L. Smoot and T. Schmidt are the Real Parties in Interest.

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Abbreviations & Explanations

Hereinafter — "Complaint" (or "Comp") refers to petitioner's first Amended Complaint. Exhibits with number designations (example: "Ex 1") refer to exhibits annexed to the Complaint. "Record" refers to the Record of Superior Court Proceedings submitted to the California Court of Appeals. And, exhibits with letter designation (example: "Ex A") refer to exhibits annexed to the Record. The Complaint was included in the Record as Exhibit A.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nanci Fisher and Stephen Fisher respectfully pray that a writ of certiorari issue to review the judgment of the California Supreme Court, entered on January 13, 1999.

Opinions Below

The September 15, 1998 Order of the California Superior Court is reprinted in the Appendix hereto (pg A1). This Superior Court order (1st) sustained demurrer, (2nd) gave petitioners the right to submit a second, limited amended complaint, and (3rd) dismissed petitioners' key causes of action involving the National Bank Act. (Refer to: "*No Remedy in the Particular Circumstances*", pg 9 of this petition). The Superior Court's October 22, 1998 Order denying petitioners' motion for reconsideration is reprinted in the Appendix hereto (pg A5).

With the objective being the preservation of their right to appeal the lower Court's action regarding the primary National Bank Act issues; petitioners submitted a petition for writ of mandate to the California Court of Appeals.

The California Court of Appeals and the California Supreme Court did not write opinions when denying petitioners' petition for writ of mandate — their orders are reprinted in the Appendix hereto (pgs A6, A7 respectively).

Supreme Court Jurisdiction

When a federal question is the issue; the Supreme Court reviews the final decisions rendered by the highest state court pursuant to 28 U.S.C.A. § 1257.

The Instant Case In The Light of Supreme Court Jurisdiction -and- The Federal Statute Involved

The highest California State Court rendered a decision denying petitioners' petition for writ of mandate.

> "The United States Supreme Court can review state court decisions in proceedings for mandamus."
>
> *2 Fed Proc, L Ed (1994)*, Appeal, Certiorari, and Review § 3:18, pg 414; also see § 3:69, pg 443

For case law support; *2 Federal Procedure* relies on *American Express v Maynard* 177 US 404, 20 SC 695, 44 L Ed 823 (1900) which starts-out by declaring that the Supreme Court has jurisdiction to review a ruling denying a petition for writ of mandate rendered by the highest State court. In describing circumstances identical to the instant case, this Court then observed that the underlying issue of the *American Express* case focused on interpretation of an act of congress:

> "'The main question in the case relates to the construction to be placed upon the act in question,' that is, the act of Congress." *id.* at 405

Fact: The underlying question involved with the instant petition for writ of certiorari relates to the construction to be placed upon the National Bank Act in the context of national banks' operations servicing their 100+ million credit card clients. 12 U.S.C.A. § 1 et seq. (*The National Bank Act*) does <u>not</u> deal with any of the national banks' credit card operational matters that are the focal point of this case.

Statement Of The Case

In March, 1998; without prior notice, defendants suddenly canceled the credit card issued (*in 1989*) to petitioner Nanci Fisher.

California Statutes Giving Rise To Causes Of Action

Defendants entirely rely on a clause in their credit card agreement (Comp, Ex 1, pg 7) as being the ultimate authority to cancel a credit card without giving notice.

> "We may close your [credit card] account... at anytime without prior notice."

But, defendants' acts (and agreement) are flagrantly unlawful as California Civil Code § 1747.85 *(part of the Song-Beverly Credit Card Act)* specifies:

> "... no card issuer shall cancel a credit card without having first given the cardholder 30 days' written notice."

The violation of the Credit Card Act establishes the basis for a legal action formulated upon the California Consumers Legal Remedies Act, Civil Code § 1770 (a)(14):

> "[It is unlawful for anyone to represent] that a transaction confers or involves rights... that are prohibited by law."

And, Civil Code § 1780 particularly provides for a cause of action whenever there is a violation of Civil Code § 1770:

> "(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action..."

Furthermore, Consumer Legal Remedies Act violations usually lead to California's *Unfair Business Practices Act* (Business & Professions Code § 17200) that also provides for a cause of action to redress unlawful business practices.

Case Law, *Relying On The Controlling California Statutes*, Supporting Causes Of Action

"An 'unlawful business activity' [pursuant to the California Business & Professions Code § 17200] includes 'anything that can properly be called a business practice and that at the same time is forbidden by law.' ... The court held that because the complaint alleged 'unlawful conduct' pursued as a business practice, a demurrer thereto could not be sustained."

People v McKale 159 Cal Rptr, 811, 815 (1980)

"An individual action may be brought under the [Consumer Legal Remedies Act] pursuant to § 1780.

"As it is unlawful to engage in any deceptive business practices enumerated § 1770, consumers have a corresponding legal right not to be subject thereto."

Kagen v Gibralter Savings 35 Cal 3rd 582, 593 (1984)

"Section 17200 [Business and Professions Code] defines unfair competition as 'any unlawful, unfair or fraudulent business act or practice...'. 'Unlawful' practices prohibited by section 17200 are any practices forbidden by law..."

Saunders v Superior Court 27 Cal App 4th 832, 838 (1994)

"The [Song-Beverly] Credit Card Act similarly imposes fair business practices for consumers. 'Such law is remedial in nature and in the public interest [and] is to be liberally construed to the end of fostering its objectives.' [citations omitted] We believe that the wilful violations of statutory standards entitles a card holder to compensation for all damages ..."

Young v. Bank of America 141 Cal App 3rd 108, 114 (1983)

Background: A Conflict In States' Decisions Produces A Case Of First Impression

The lower courts' determinations cement-into-place strict rules that control the legal relationships between credit card issuers and 100+ million bank-issued credit card holders.

> "The law is well settled that terms on which a national bank may establish its [credit card] accounts are not subject to control by state law.
>
> *Defendants' June, 1998 letter* responding to petitioners filing the original complaint in California Superior Court (Comp, Ex 6, pg 3)

Interestingly when appearing as the petitioner in the New York case of *Citibank (South Dakota) N.A. v Gonzales* 452 NYS 2nd 1012 (1982) — defendant in the instant case, Citibank (South Dakota) N.A., relied on the same argument as is its only support in this California case.

> "The petitioner... contends that as a 'national' bank that it is exempt from the requirements of CPLR Section 8501 because state law does not apply to it." *id.* at 1015

Unlike the California Court in the instant case that adopted the defendants' argument — the New York Court emphatically obliterated any idea that the National Bank Act automatically exempts all national bank actions from State laws.

> "**The courts have consistently held that national banks are subject to state law** unless the state law expressly conflicts with federal law or infringes upon national banking law or imposes an undue burden upon the performance of the National Banks' functions." (14 citations omitted) *id.* at 1014 (emphasis added)

The New York Court then focused on "uniqueness":

> "It appears that the facts and the questions of law applicable to the instant motion have not been decided before, and that this case is one of apparent first impression." *id.* at 1014

Likewise, the instant action is also a case of first impression as all preceding federal decisions focus on interest rates, charges, fees, deposits/withdrawals, and a myriad of other matters included under the expansive National Bank Act umbrella. Following the prevailing standard; a recent Supreme Court case, again involving defendant Citibank (South Dakota) N.A., provides the best insight into the uniqueness of the instant case — in *Smiley v Citibank (South Dakota) N.A.* 517 US 735, 116 S Ct 1730, 135 L Ed 2nd 25 (1996); this Court agreed with the defendants' argument that the National Bank Act encompassed interest charges and late fees. Therefore, in *Smiley*, defendant Citibank was exempt from State laws.

Although defendants' eternal, everywhere arguments are firmly built on the this Court's *Smiley* rationality; the key differentiating factor in the instant case is the defendants' unconditional corroboration that the National Bank Act is not involved in any manner whatsoever with issues that form petitioner's' cause of action. Specifically, defendants wrote petitioners in a June, 1998 letter (Comp, Ex 6, p 3):

> "There is no provision either in federal law or South Dakota Law similar to California Civil Code § 1747. 85 [requiring 30-days notice before canceling credit cards]."

Therefore, with full-understanding that there is no necessity for this Court to interpret what is (*or is not*) included in the National Bank Act — for the first time, Court deliberations begin with the distinct fact that the only surviving issue is whether status as a national bank automatically exempts defendants from compliance with State laws clearly not covered by the National Bank Act.

The Federal Question Was Presented In The Lower Courts As Defendants Argue That The Controlling California Statutes And California Case Law Are Canceled-Out By The National Bank Act

Defendants argue:

> "As the written agreement governing Ms. Fisher's credit card account expressly stated, her account was at CBSD [Citibank (South Dakota) N.A.], a federally-chartered bank. Therefore, the terms and conditions on which the account could be maintained or canceled are not subject to control by State Law such as Cal. Civ. Code §§ 1747.85, 1770, 1980 ...." [1]
>
> Defendants' Memorandum of Points and Authorities in support of their Demurrer submitted in California Superior Court; Cite taken from Petition For Writ Of Mandate, Record of Superior Court Proceedings; submitted in the California Court of Appeals (Record, Ex D, pg 12)

While petitioners initially forced the National Bank Act onto the surface in their complaint (¶¶ 41-44); on page 2 of their Memorandum of Points and Authorities Opposing Demurrer (submitted in Superior Court), petitioners establish their underlying legal argument that is fervently carried through into the California Court of Appeals (memo, pg 2) and California Supreme Court (memo, pg 5).

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[1] For support of their position that they are exempt from California law; defendants rely on *Easton v Iowa* 188 US 220, 230 (1903) which determined (decades before there was such a device as a credit card) that the National Bank Act controls matters dealing with deposits and withdrawals. And, defendants further rely on *Jacobs v Citibank* 459 NYS 2nd 781 (1981) that reiterated the ever-present, incontestable premise that national banks' fees and charges are controlled by the National Bank Act.

> "As defendants point-out in their letter (Complaint, Exhibit 6, pg 3); there simply exists "no provision ...in federal law" regarding credit card issuers giving notice before credit card cancellation as is the rule stipulated by California Civil Code § 1747.85. Obviously, preemption cannot possibly be a consideration because there is nothing to preempt. In other words, with ***no*** "supreme" federal law to interfere — California Civil Code § 1747.85 stands secure and alone at the pinnacle of the instant case. For these reasons, the National Bank Act is inconsequential to the instant proceedings. *Perdue v Crocker Nat. Bank* 216 Cal Rptr 345, 365 (1985)"

Although the lower courts, in the instant case, were silent as to the National Bank Act; both sides of the controversy entered the courtrooms relying on specific and straightforward arguments — with resounding clarity, the record is replete with direct quotations voicing (in all lower state courts) the opposing parties conflicting interpretations of the National Bank Act. As was determined in *Street v New York* 394 US 576, 89 S Ct. 1354, 22 L Ed 2nd 572 (1969); the parties emphatically stated positions dealing with federal questions satisfies the requirement that the federal issue was presented in the lower court.

> "In this case, ... at the trial level, ... there appears to be no doubt that the [federal] issue... was raised in both the Appellate Term and the Court of Appeals, and the State does not suggest the contrary. In the trial court, the appellant's counsel raised the constitutional issue..." (appellant's quotation omitted) *id.* at 581

In the instant case, the record substantiates that the federal claim was presented with "fair precision and in due time" as required in *New York ex rel. Bryant v Zimmerman* 278 US 63,67, 49 S Ct 61, 73 L Ed 184 (1928)

No Remedy In The Particular Circumstances

The lower court (1st) dismissed petitioner's first amended complaint's primary causes of action that were impacted by the National Bank Act, and (2nd) provided petitioners with an opportunity to submit a limited, second amended complaint as to the alleged cause of action in slander, and (3rd) after hearing oral arguments, allowed petitioners to claim (in said second amended complaint) a never previously alleged cause of action in breach of contract.

The decision placed petitioners between a rock and a hard place — if petitioners amended the first amended complaint following the Court's order to eliminate the chief National Bank Act related causes of action; the resulting new second amended complaint would replace and eliminate the first amended complaint. Therefore, petitioners would effectively lose their right to appeal the National Bank Act causes of action which comprise the main elements of the first amended complaint.

On the other hand — if petitioners failed to appeal; then the first amended complaint remains in-force which, *in turn*, means that petitioner can never allege (let alone appeal) the cause of action in breach of contract that initially evolved from the passion and facts presented during oral argument.

The Sustaining Of Demurrer Is A Final Decision As There Exists No Added Factual Or Legal Issues

Petitioners herewith declare that there exists no further law or facts involved with this case. The case rests entirely on the federal claim dealing with the interpretation of a federal statute — if the defendants are, *in fact*, completely exempt from all State laws pursuant to the National Bank

Act; then the case is settled as they would have acted within their legal authority when canceling the credit card. On the other hand, if the National Bank Act does not provide across-the-board, endless exemptions from all States' law; then the defendants violated State laws and are thereby liable pursuant California Civil Code §§ 1747.85, 1770 1780; and California Business & Professions Code § 17200.

In submitting their demurrer, the defendants have raised the provisions of the National Bank Act (refer back to pg 7 of this petition). Accordingly, the State Courts' decisions sustaining demurrer are reviewable in the U.S. Supreme Court although ruling on demurrer is not necessarily a final decision.

> "In *Pope v Atlantic Coast Line R. Co.* 345 U.S. 379, 382, 73 S.Ct. 749,751, 97 L. Ed.1094, the Georgia Court reversed the order of a trial Court sustaining a general demurrer to a suit.... The demurrer had raised the provisions of federal statute .... The Georgia courts' denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment.
>
> "Petitioner conceded before this court that he had no further factual or legal issues to present to the Georgia trial court and respondent does not suggest that the matters adjudicated by the Georgia Supreme Court are not final and conclusive upon petitioner and the lower court. Since there was nothing more substance to be decided in the trial court, the judgment below was final within the meaning of 28 U.S.C. § 1257."
>
> *Local No 438 v. Curry* 371 US 542, 549, 83 S Ct 531, 9 L Ed 2nd 515 (1963)

In the event that the lower courts' action could be construed as not being final, the instant case neatly falls into several of the categories that define "final judgment" for the purposes of granting a petition for writ of certiorari. *Cox Broadcasting Corp. v Cohn* 420 US 469, 371 S Ct 1029, 43 L Ed 2nd 328 (1975) All the federal issues have now been reviewed and decided by the State's highest court. And, if this instant petition is not granted — petitioner will be forced back into the State court system to undergo a wasteful, duplicative appeal process that would be a useless formal gesture of no substance. Undoubtedly, the end result could only be further delay as a for-sure future development would have petitioners walking-up the U.S. Supreme Court steps next year armed with the exact same facts, circumstances and arguments as is herein presented. In essence, the federal issue will survive regardless of developments in the State forum. Thus, even in the worst case scenario where there might be questions regarding finality — the instant case embodies "expanded finality" as defined by this Court in the *Cox* decision.

Because of petitioners' unwavering principles would not allow the sacrificing of their causes of action regarding the National Bank Act related federal question — petitioners were forced to refrain from submitting a second amended complaint within the time period set by the California Superior Court. (Refer back to page 9 of this petition for added explanation of the petitioners' pleading dilemma.) Therefore, an order (dated: February 22, 1999) has now been entered dismissing the first amended complaint. Thus, into the U. S. Supreme Court comes this case tightly focused only on the federal question — "there is nothing more to be decided". *Clark v Willard* 292 US 112, 118, 54 S Ct 615, 78 L Ed 1160 (1934) Under these particular circumstances, the Supreme Court has jurisdiction over the case. *Richfield Oil Corp. v State Board of Equalization* 329 US 69, 67 S Ct 156, 91 L Ed 80 (1946)

REASONS FOR GRANTING THIS PETITION INVOLVE SUBSTANTIAL QUESTIONS THAT IMPACT 100+ MILLION AMERICANS

I. The Lower Court Erred As The National Bank Act Does Not Automatically Give National Banks Inexhaustible Exemptions To All States' Laws

"Preemption" is adroitly clarified in the century old, often-cited decision of *McCellan v Chipman* 164 US 347, 17 S Ct 85, 41 L Ed 461 (1896) that sets-in-place a type of 3-point test in which national banks are determined to be subject to state law unless the state law (1st) expressly conflicts with federal law, and/or (2nd) impairs national banks efficiency to discharge their duties imposed upon them by federal law, and/or (3rd) frustrates the purpose for which national banks were created.

None of these exceptions apply in the instant case where the triggering event was a credit card cancellation following an unconditional corporate policy that exists in direct violation to a state statue (Civil Code §§ 1747.85). Actually, defendants themselves rule-out the applicability of the first two *McCellan* exemptions as they write:

> "There is no provision either in federal law or South Dakota Law similar to California Civil Code § 1747. 85."
>
> *Defendants' June, 1998 letter,* Comp, Ex 6, pg 3

Obviously, with no federal law that deals with cancellation of credit cards; it would be illogical, *if not impossible,* for Civil Code § 1747.85 to conflict with something that does not exist (*re: 1st McCellan exception*). And, following the same rationale; it would be illogical, *if not impossible,* to impair the duties imposed by a federal law that does not exist (*re: 2nd McCellan exception*).

Regarding the final (*i.e.*, 3rd) *McCellan* exemption — the National Bank Act was enacted in 1864 which is about three-quarters of a century before the invention of credit cards. Therefore, it would be illogical, *if not impossible*, for laws dealing with credit card cancellation in the 20th Century to frustrate the purpose for which the National Bank Act was enacted in the 19th Century.

Because relevant authorities simply do not exist; it is not at all surprising that defendants and the lower courts have conspicuously failed to provide statutory and/or case law to support claims that national bank status bestows on defendants an unqualified, all-inclusive exemption from every State law as is the defendants' primary argument:

> "... the terms and conditions on which the [credit card] account could be maintained or canceled are not subject to control by State Law such as Cal. Civ. Code §§ 1747.85 ...."
>
> Defendants memorandum supporting demurrer (refer to pg 7 of this petition for elaboration)

After *McCellan* — this Court further refuted the absolute exemption argument in *Anderson National Bank v Lockertt* 321 US 233, 64 S Ct 599, 599 L Ed 692 (1944) where it is resolutely explained that national banks are, *in fact*, subject to state laws, unless those laws infringe on the National Bank Act.

Herein, with defendants arguments (and the lower courts determinations) colliding head-on against this Court's rulings in *McCellan* and *Anderson*, lies the crystallization of the primary "question presented" that serves as the underlying foundation for this petition.

> "Concerning national banks' credit card operations — for the 100+ million holders of bank-issued credit cards; do State laws exercise control over legal matters clearly not involved with any facet of the National Bank Act?"

If the National Bank Act Provides National Banks With Unrestricted Exemptions From All States' Laws, Then This Petition Must Be Denied — Otherwise;

II. Usurpation Of Power And Clear Abuse Of Discretion Warranted Mandamus Relief As The Lower Courts Decisive Refusal To Enforce The Law Effectively Destroyed The Explicit Statutes That The State Legislature Enacted To Protect Unsuspecting Citizens

The controlling statute is expressed in such distinct, matter-of-fact terms that it impossible to misunderstand or misinterpret meaning, function and/or intent when the California State legislature enacted Civil Code § 1747.85:

> "... no card issuer shall cancel a credit card without having first given the cardholder 30 days written notice..."

It is an unquestioned rule of law that a plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to adjust or ignore its meaning defeats the purpose of said stature. *Helving v New York Trust* 292 US 455, 54 S Ct 806, 78 L Ed 1361 (1939) Moreover, the courts operate under a rule of law in which they are duty-bound to take, construe and apply statutes in the form enacted by the legislature. *Denn v Reid* 35 US 524, 9 L Ed 519 (1836)

The deep-rooted mystery that surrounds the instant case revolves around the perplexing, unanswered question of why the California statutes do not apply to defendants as the courts are assumed to be governed by the all-powerful precept that the legislature intended to enact an effective law. *Coswell v Benson* 285 US 22, 52 S Ct 285,76 L Ed 598 (1932) In the instant case, the everlasting truism that keeps rising to the surface is that the courts' silence has essentially given defendants a license to violate the law.

When rendering a ruling concerning a controversial law in *TVA v Hill* 437 US 153, 173, 98 S Ct 2279, 57 L Ed 2nd 117 (1978) — it appears that this Court felt obliged to first explain that a court's primary mission is to enforce the law:

> "One would be hard pressed to find a statutory provision whose terms were any plainer...
>
> "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for **the courts to enforce them [*i.e., the laws*] when enforcement is sought.**" (emphasis added)

And, the Supreme Court underscored it's declaration of the courts' duty to enforce the law by quoting "*Sir Thomas More*" by Robert Blake (*id.* at 195):

> "'The law, Roper, the law. I know what is legal, not what's right. And, I'll stick to what's legal.'"

The instant legal action is a case of hard-core, undisputed facts analyzed in conjunction with hard-core, undisputed law set-forth in precise, easy-to-understand language. Of course, the lower courts had the built-in flexibility and authority to interpret and apply the law in any manner deemed appropriate. BUT, the court abused its discretion and acted beyond the scope of its authority when it outright rejected (*i.e., ignored*) the controlling law.

True, the universal principle is that a writ of mandate exists as an extraordinary remedy that should not issue even to correct gross errors — however, it is also the predominate and well settled rule of law that the court should issue the writ whenever it is necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so". *Roche v Milk Ass'n*, 319 US 21,26, 63 S Ct 938, 87 L Ed 1185 (1943)

In accordance with the "rule" — petitioners grasp onto the decision in *Mallard v U.S. Dist. Court For The Southern Dist. Of Iowa* 490 US 296, 109 S Ct 1814, 104 L Ed 2nd 318 (1989) in which this Court explains that interpretation of statutes begins with a statute's language. *Id.* at 321 *Mallard's* petition to the Supreme Court resulted from a federal Court of Appeals denial of his application for a writ of mandate. It was *Mallard's* contention that the lower court had misinterpreted a statute — and, this Court ruled that *Mallard* was entitled to the writ of mandate because the lower court had plainly acted beyond its jurisdiction by rendering a decision based on a misinterpretation of the controlling statute.

Furthermore, this Court explained that its *Mallard* ruling was based on (1st) lack of an alternative remedy, (2nd) the lower court's judge not being named a litigant, and (3rd) petitioner not attempting to sever one element of the merits of litigation from the rest of the case. *id.* at 308 On point with *Mallard* — in the instant case, (1st) petitioner has no alternative remedy (refer to pgs 9-11 of this petition), (2nd) the lower court judge was not named a litigant, and (3rd) petitioner did not attempt to sever one element of the litigation from the rest of the case that is dependent on interpretation of the National Bank Act granting national banks exemption from State law.

However, there is one glaring difference between the 2-cases — rather than *Mallard's* claim of statutory misinterpretation; in the instant case, the lower court wholly repudiated the statute. In the final analysis, there is no question that defendants had the absolute right to cancel the credit card for any reason — nevertheless, this case's foundation is built-on the premise that petitioners had every reason to place unequivocal, blind trust on the State legislature's edict (Civil Code § 1747.85) guaranteeing that their card issuer would provide 30-days notice if ever their credit card was going to be canceled.

The lower courts effectively gave tacit approval of defendants willful violation of the legislature's decree by inclusively refusing to enforce the very law that had been enacted to protect the petitioners.[2] In real-life terms; the legal system failed as petitioners were denied their rights when the lower courts refused to act upon the case properly brought before it. Mandamus is an established remedy to oblige inferior courts to do that justice which they are in duty and by virtue of their office bound to do. *Com of Virginia v Rivers* 100 US 313, 25 L Ed 667 (1879)

> "Writs afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction of compelling it to exercise its authority when it is its duty to do so."
>
> *Ex parte Republic of Peru* 318 US 578, 582, 63 Sup Ct 793, 87 L Ed 1014 (1943)

By refusing to enforce the controlling law, the lower courts abused their discretion and rejected their duty — petitioners are now seeking the *"Mallard solution"* in which the lower court is directed to exercise its authority pursuant to their inherent duty to enforce California Law, precisely Code §§ 1747.85, 1770, 1780, and 17200.

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[2] In the instant case — where the defendants begin by acknowledging that there exists no relevant federal law -and- no relevant other states' law; alone in the legal arena is "Citibank Law"-*versus*- "California Law":

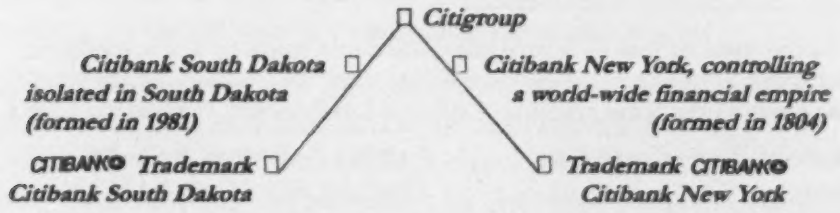
Citibank Law: *Credit Card Agreement* (Comp. Ex 1, pg 7)	***California Law:*** *S-B Credit Card Act* (Civil Code § 1747.85)
"We may close your [credit card account... at any time without giving prior notice."	"... no card issuer shall cancel a credit card without first giving the cardholder 30 days notice."

With the entry of the Court's Order (in Appendix, pg A1) sanctioning the defendants cancellation of petitioner's credit card without prior notice; two radically-new, crystal-clear *rules of law* come into existence:

- The statutes enacted by the California legislature are meaningless.
- The Laws of California are written and enforced by corporations.

III. The Decision Below Raises Important Public Interest Issues As The Courts Sit-Idly-By While The Free-Wheeling Corporate Defendants Undertake A Marketing Strategy Aimed At Purposely Deceiving Their 29-Million Customers

A tell-tale view of reality comes from petitioners launching their legal action by naming New York based Citibank N.A. (hereinafter, "Citibank New York") as the lone Citibank defendant. After submission of the original complaint; petitioners were amazed to learn that world renowned Citibank New York had no association with the Citibank credit card. Because of this defendants revelation — it dawned on petitioners that they had been misled by the CITIBANK trademark that was plastered on everything associated with the advertising, promoting, securing, renewing and using the credit card. Defendants explained that a business entity named Citibank (South Dakota) N.A. (hereinafter, "Citibank South Dakota") was the sole, responsible issuer of the Citibank credit card. Thus, petitioners deception was precipitated by "mother company" Citigroup licensing identical trademarks to both Citibank New York and Citibank South Dakota.


Citigroup
Citibank South Dakota isolated in South Dakota (formed in 1981)
Citibank New York, controlling a world-wide financial empire (formed in 1804)
CITIBANK Trademark Citibank South Dakota
Trademark CITIBANK Citibank New York

After finally coming to grips with the idea that they had been duped — for the next question; the ever -inquisitive petitioners wanted to know if they were simply stupid -or- whether their deception was common-place throughout the world of Citibank credit card holders.

A California case provided petitioner's an easy methodology to measure the public's perception of *(or deception relating to)* the source of their credit card: [3]

> "... probable confusion [regarding the origin of the trademark and identity of the sponsoring company] may be shown by a scientifically conducted opinion survey in the relevant [California] market area."
>
> *N.C. Dairy Found. v Foremost-McKesson* 154 Cal Rptr 794, 801 (1979) [Comp pg 23, note 9]

Following the guidelines established in the *N.C. Dairy* decision; petitioners conducted several preliminary market surveys that revealed petitioners were not alone or stupid (petitioner's memorandum in opposition to demurrer submitted to the California Superior Court, pg 9 —reiterated in memorandums submitted to the California Court of Appeals and Supreme Court)

"When you see CITIBANK displayed in Citibank advertising, do you believe:

This is the trademark of the New York based, international bank conglomerate?

or

This is the trademark of a South Dakota bank with offices only in South Dakota?"

Results*

Consumers who recognize the trademark as being Citibank South Dakota	Consumers who recognize the trademark as being Citibank New York	People who answer "I don't know"
0%	96%	4%

*As a precondition, only consumers who recognize the trademark CITIBANK are included in this phase of the survey. Lawyers and bankers were excluded from the survey. The survey includes Citibank credit card holders — 12% of those people surveyed carried a Citibank credit card.

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[3] Facts revealed during the course of the lower courts' proceedings included: (1st) Citibank was the world's largest issuer of credit cards, (2nd) Citibank had issued 29-million active credit cards, and (3rd) about 9-million California residents carry Citibank credit cards.

In order to determine whether the deception of 29-million consumers could be legal; petitioners searched-out the 9th Circuit decision in *Fleischmann Distilling Corp v Maier Brewing Company* 314 F 2nd 149 (1963) that sets-in-place the guiding *rules of law* dealing with causes of action directly resulting from purposeful deception of the public when 2-companies use identical trademarks — the elemental facts of the *Fleischmann* case and the instant case are identical as both begin with world famous, highly distictive trademarks.

THE FLEISCHMAN CASE	THE INSTANT CASE
There is no dispute as to the fact: 2-independent companies use identical registered trademarks "Black & White"	There is no dispute as to the fact: 2-independent companies use identical registered trademarks CITIBANK
The original user of the trademark was founded in the 19th century and enjoys a renowned, world-wide reputation	The original user of the trademark was founded in the 19th century and enjoys a renowned, world-wide reputation
A new product (introduced by a new company) uses the same trademark, "Black & White"	A new product (introduced by a new company) uses the same trademark, CITIBANK
"[defendant new company] knew, just as we do, that it had open to it a whole dictionary full of words... from which to select a non-offending label. The evidence shows that at the same time [defendant new company] was using no less than 21 separate names or labels." *id.* at 145	Defendants companies had unlimited dollar/creative resources to conceive distinctive, not confusing trademarks. The evidence (Patent & Trademark Office records; Comp, Ex 7) shows many old company related business entities using unique, individualized trademarks.

Indubitably, deception had to be the sole motivating force; otherwise, "new company" defendants in both cases would have simply presented to the public individualized and distinctive trademarks. In the *Fleischman* case — the Court of Appeals ruled that an injunction should issue to stop the "new company" defendants from deceiving the public through use of the original company's trademark.

With the realization that they could readily prove that the Citibank CITIBANK trademark has succeeded in effectively deceiving 29-million Americans into believing that they were carrying credit cards issued and supported by the renowned Citibank New York that controls a world-wide financial empire — using the *Fleischman* decision as the jumping-off point; petitioners were then confronted with what appeared, *at first*, to be the impossible task of understanding complex, ever-changing state and federal trademark decisions. Worse yet, petitioners came to realize that they were again operating in uncharted legal waters where "mother company" Citigroup was undertaking deliberate efforts to deceive the public by licensing the 200-year-old, world-renowned, subsidiary company's famous and distinctive trademark (CITIBANK) to another new, unknown subsidiary company isolated in South Dakota. Thereby was born a sure-fire formula for deception as new company Citibank South Dakota's marketing to the outside world is deliberately designed to ride piggy-back on the celebrated reputation of Citibank New York. In every instance, *bar none*, Citibank South Dakota advertising and promotion efforts always starts-and-ends with the large, prominent display of CITIBANK.

Petitioners' quest for understanding was achieved when it became apparent that a vast majority of the confusing trademark rulings were bound together with a single key word: "intent". This discovery wiped-away all obstacles as petitioner's had to go no further than defendants' June, 1997 letter (Comp, Ex 6, pg 3) that was the immediate response to service of the original complaint.

> "...even to the extent that any state law might conceivably govern the terms and circumstances of the cancellation of the account, it would by South Dakota law, and not California law. Citbank (Sourth Dakota) N.A. is located in South Dakota and has no banking (or other) offices in any other state...."

Obviously, defendants have adopted a page out of Robert Vesco's 1960s *"how to deception book"* dealing with devising protected off-shore business operations. In the instant case, notwithstanding the massive deception; once "intent" was identified as the common thread running through innumerable trademark cases — petitioners began legal research concentrating on defendants' pronouncements identifying their safe-haven in the South Dakota wilderness. [4] Petitioners discovered over a hundred State and Federal cases initiated by credit card holders against Citibank — however, *at this point*, now operating with an educated insight into defendants' modus operandi; petitioners were not surprised that they could not find an *in-South Dakota* case brought-on by any of the 29-million card holders from other states. In essence, the creation of an independent company tucked-away in the scenic South Dakota back country has provided a more secure and protected sanctuary for defendants than the Bahamas provided for Robert Vesco.

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[4] Petitioners substantiated a wide-spread, shrewd corporate strategy aimed at deceiving the public. In the complaint were: (1st) copies of U.S. Patent & Trademark Office records proving that it was routine for other "Citibank" related companies to adopt unique, individualized trademarks — therefore, the 2-companies in the instant case, *using the same trademark*, was not a standard procedure, (2nd) copies of billing, advertising, soliciting, marketing and contracting material prominently displaying only the CITIBANK trademark aimed at implanting the idea that Citibank New York was the moving force behind the credit card [as it has been established that the public does not know that Citibank South Dakota even exists], (3rd) a copy of the original 1989 contract (*signed by petitioner — signaling the acceptance of the credit card offer*) that relied on trademarks CITIBANK & MasterCard to indicate that defendants Citibank New York and MasterCard were the credit card's sole issuing and sponsoring companies, and (4th) a magnifying glass was provided with the complaint in order to give the court the ability to read the cut-out (actual size) from defendants' California credit card application: Citibank MasterCard and Visa cards are issued by Citibank (South Dakota), N.A. – in the application, this defendants only mention of Citibank South Dakota is hidden in prolix material under the trademark (actual size): CITIBANK

The Dichotomy Of Deception

First comes the sales campaign as defendants stand on the world's stage, unabashedly waving the CITIBANK banner while loudly trumpeting the credibility and safety found in a 200-year-old, world renowned banking institution. For example, in their complaint (¶¶ 66-83, Ex 3), the petitioners cite defendants' California advertising: "But most important, it [having a Citibank credit card] means that wherever you go, down the street or around the globe, you take along with you one of the world's leading financial institutions: Citibank. CITIBANK "

For the innocent cardholder, "ignorance is bliss" until there is a problem — suddenly, "world" and "globe" connotations instantaneously dissipate the moment a suffering Citibank cardholder begins to hunt for corporate responsibility. At the first sign of impending trouble; defendants advise the Citibank cardholder that the issuer of their credit card is really a South Dakota company that has offices only in South Dakota. And, if legal action is a consideration — the Citibank cardholder must go to South Dakota where the controversy will be decided pursuant to South Dakota laws. (refer to quote on pg 7 of this petition)

Defendants' own words paint a picture of sheer lunacy as the advertising blares-out that the card holder always takes along "one of the world's leading financial institutions: Citibank" which, *in reality*, is some secluded South Dakota bank that nobody has ever heard-of.

Credit cards are a 20th century invention that were born from high-speed computers — adopting old laws to modern-technology operations is a certain-way to pave the road to corporate abuse as is best evidenced by the double-whammy deception of 29-million Americans (excluding attorneys and bankers) who now have no idea of who is the responsible supplier of their life-supporting credit cards.

The credit card historical perspective comes into clear focus with defendants arguments that must start-out, *at the beginning*, with that day in 1864 when all the congressmen rode their horses to work at the old federal building in Washington. So goes defendants argument — these congressmen ratified the National Bank Act that was intended (in the next century) to control operational aspects of the yet-to-be-conceived credit card industry that is now entirely based on rockets that propel sophisticated communications satellites into orbit around the earth. Herein, completes the full-circle back to the National Bank Act as logic must lead to the reasonable conclusion that, *in 1864* — rather than acting as soothsayers who were motivated by science fiction stories ; the congressmen actually intended to control deposits, loans, fees, withdrawals, interest, charges and other purely bank functions that trace their roots back to pre-biblical times.

With there being no dispute to defendants admission that the cancellation of credit cards falls into that vast abyss of credit card operations not controlled by any pre-existing federal law such as the National Bank Act (refer to page 6 of this petition) — it is the States that have jumped into the void as is demonstrated by California's Song-Beverly Credit Card Act, Consumers Legal Remedies Act and the Unfair Business Practices Act that were enacted to protect unsuspecting citizens from being victimized by wrongful actions that are incontestably well-beyond the scope of the National Bank Act.

But, the Courts have to step-up-to-the-plate and enthusiastically carry-out their duty to enforce the law.

> "It is emphatically the province and duty of the judicial department to say what the law is."
>
> John Marshall (1755-1855) writing in *Maybury v Maybury*, 1 Cranch 1317 (1803)

In the final analysis, the "duty" to enforce the law has become a mere fantasy as the lower courts have handed Citibank a magical wand in the form of the National Bank Act that assumes mythical proportions in all areas of credit card operations. It seems that defendants need only to wave their magic wand and make disappear any unpleasant states' laws and/or any semblance of honest business practices that might interfere with their profit objectives.

Summary: The Instant Case In 478 Words

The Case Facts: The defendants suddenly canceled petitioner's credit card without giving prior notice.

Controlling State Statues: California Civil Code § 1747.85 requires all credit card issuers to provide 30-days notice before credit card cancellation. California Civil Code § 1770(14) states it is "unlawful" for business practices not to comply with California statutes — Civil Code § 1780 provides for a cause of action whenever there is a violation of § 1770. And, California Business & Professions Code § 17200 also provides for a cause of action whenever a party undertakes business practices that are prohibited by law.

Defendants Argument: While (1st) not disputing that they violated the law by canceling the credit card without providing notice, and (2nd) acknowledging that there exists no relevant federal laws; the defendants claim:

- The National Bank Act gives defendants the authority to violate all California laws — therefore, California statutes are meaningless to defendants in-California business operations.

- Defendants' credit card agreement provision: "we may close your [credit card] account... at anytime without prior notice" establishes the defendants "laws" in California — in essence, defendants position is that the National Bank Act gives Citibank the authority to write and enforce "laws" for its California operations.
- South Dakota laws are the only State laws that could exercise control over defendants' California credit card operations — if a California resident is damaged by defendants business practices; the victim must go to South Dakota in order to seek legal recourse.

The Defendants Demurrer: For the reasons expressed in their argument; defendants requested that the Court sustain demurrer and dismiss the complaint.

The Court's Ruling: Demurrer sustained — and, the complaint was dismissed.

The Question Presented: "... do state laws exercise control over legal matters clearly not involved with any facet of the National Bank Act?" The lower courts emphatically answered "no" thereby placing a resounding stamp of approval on defendants' preeminent position that the National Bank Act allows Citibank to function as a law unto itself when operating its California credit card business. Herewith, under the guise of the National Bank Act; "truth becomes stranger than fiction" — the extraordinary reality is that lower courts, *in the absence of any relevant federal -or- other states statutes,* have ordained defendants with governmental authority to write and enforce laws to govern 9-million California credit card holders.

Conclusion

For these various reasons — this petition of writ of certiorari should be granted:

Dated: March 23, 1999

Respectfully submitted,

Nanci Fisher,
Petitioner pro se

Stephen Fisher,
Petitioner pro se

APPENDIX

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

NANCI FISHER, STEPHEN FISHER, Petitioners, *versus* CITIBANK N.A.; CITIBANK FSB (CALIFORNIA); CITIBANK, (SOUTH DAKOTA) N.A.; MASTERCARD INTERNATIONAL, INC.; C. L. SMOOT; T. SCHMIDT; Defendants.	)	CASE NO: 995067 ORDER RE DEMURRER

This matter was heard on August 27, 1998, before the Honorable David A Garcia, Department 301 of the above-entitled court, with appearances as followd: Eric J. Mogilnicki, Esq. And Christi M. Gotvald, Exq. Appeard for defendants CITIBANK N.A., CITIBANK, F.S.B., CITIBANK (SOUTH DAKOTA), N.A., MASTERCARD INTERNATIONAL, CHRISTY SMOOT, and THOMAS, SCHMIDT and petitioners Stephen Fisher and Nanci Fisher appeared on their own behalf.

This matter having been fully considered and proof being made to the satisfaction of the court, the court:

1. Sustains the demurrer without leave to amend as to all causes of action brought by Stephen Fisher on the grounds that Stephen Fisher lacks standing;

2. Sustains the demurrer without leave to amend as to all causes of action by Nanci Fisher against defendants CITIBANK N.A., CITIBANK, F.S.B., MASTERCARD INTERNANTIONAL, CHRISTY SMOOT, and THOMAS SCHMIDT on the grounds that Nanci Fisher has failed to state facts sufficient to constitute any cause of action against these defendants;

3. Sustains the demurrer without leave to amend to all causes of action by Nanci Fisher against CITIBANK (SOUTH DAKOTA), N.A., WITH THE EXCEPTION OF THOSE NOTED BELOW, ON THE GROUNDS THAT Nanci Fisher has failed to state facts sufficient to constitute a cause of action against this defendants.

a. Sustains the demurrer with leave to amend to allow Ms. Fisher to plead a cause of action for breach of contract, provided that any amended complaint plead that plaintiff was not in violation of any term of her contract with Citibank (South Dakota), N.A., including the requirement that

plaintiff not default on any other Citibank card agreement;

b. Sustains the demurrer with leave to amend as to Ms. Fisher's cause of action for slander, provided that any amended complaint plead malice with specificity Ms. Fisher has 10 days from the date of service of the Notice of Entry of Order in which to amend her complaint.

9/14/98

So ordered

/s/ David A. Garcia

[Judge of the Superior Court]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

NANCI FISHER, STEPHEN FISHER, Petitioners, *versus* CITIBANK N.A.; CITIBANK FSB (CALIFORNIA); CITIBANK, (SOUTH DAKOTA) N.A.; MASTERCARD INTERNATIONAL, INC.; C. L. SMOOT; T. SCHMIDT; Defendants.	)	CASE NO: 995067 ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION

This matter came on regularly for hearing on October 22, 1998, before theHonorable David A. Garcia, Department 301 of the above-entitled court. Christi M. Gotvald, Exq, appeared for defendants CITIBANK N.A., CITIBANK, F.S.B., CITIBANK (SOUTH DAKOTA), N.A., MASTERCARD INTERNATIONA, CHRISTY SMOOT, AND THOMAS SCHMIDT. Petitioners did not appear,

having previously filed a Notice of Nonappearance with the court.

This matter having been fully considered and proof being made to the satisfaction of the court, this court ORDERS THAT plaintiffs' motion for reconsideration is denied.

DATED: 10/22/98

/s/ David A. Garcia
DAVID A. GARCIA
JUDGE OF THE SUPERIOR COURT

COURT OF APPEAL, FIRST APPELLATE DISTRICT
303 SECOND STREET, SOUTH TOWER
SAN FRANCISCO, CA 94107
DIVISION 5

FILED
Court of Appeal-First App. Dist.
November 13, 1998
RON D. BARROW, CLERK

NANCI FISHER Et Al.,
Petitioners

v.

SUPERIOR COURT OF SAN FRANCISCO,
Respondent;

CITIBANK Et Al.,
Real Parties In Interest

A084694
San Francisco County No. 995067

BY THE COURT:

The petition for writ of mandate is denied.

Date: Nov 13, 1998 JONES, P.J. P.J.

First Appellate District, Division Five, No. A0864694
SO74887
IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
Filed January 13, 1999
Robert Wandruff Clerk
Deputy

NANCI FISHER Et Al., Petitioners

v.

SUPERIOR COURT OF SAN FRANCISCO, Respondent

CITIBANK Et Al., Real Parties In Interest

Petition for review DENIED.

George
Chief Justice